No. 4050.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of GEORGE S. SPIROPLOS, MILTIADES SPIROPLOS and GUST SPIROPLOS, partners under the firm name of George Spiroplos and Brothers,

Bankrupts,

CHAS. BODEAU, as Trustee in Bankruptcy of the estate of George S. Spiroplos, Miltiades Spiroplos and Gust Spiroplos,

Appellants,

vs.

GEORGE S. SPIROPLOS, MILTIADES SPIROPLOS and GUST SPIROPLOS,

Appellees.

Upon appeal from the United States Circuit Court for the District of Oregon.

APPELLANTS' BRIEF.

PACKWOOD & PACKWOOD, of Baker, Oregon,
Attorneys for Appellees.
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Attorneys for Appellees.
A. A. SMITH, of Baker, Oregon,
Attorney for Appellant.

STATEMENT OF CASE.

On the 30th day of October, 1920, appellees filed in the district Court of the United States for the District of Oregon, their petition to be adjudged bankrupts both as a partnership and individually. An order was made on that date duly adjudging them as bankrupts and under the customary routine the entire matter was referred to the referee at Baker, Oregon. At a meeting of the creditors called by him the appellant was elected as Trustee and proceeded to take charge of the property. Two hearings were held for the purpose of discovering assets at both of which George S. Spiroplos, one of the appellees appeared and testified. The testimony taken at both of these hearings by stipulation was included as a part of the testimony taken upon objections to discharge.

Subsequently and in due time the appellees filed their petitions for discharge. A meeting of the creditors was then called and at this meeting the appellant was directed by the creditors to appear and file objections to the discharge and take such proceedings as were necessary to properly present the same to the Court. Acting in accordance with the authority thus given the appellant filed objections to the discharge of the bankrupts. These objections, specifications of which were filed and served as required by law were based principally upon two propositions.

(1) Concealment of assets.

(2) False statements on account of failure to include assets concealed in schedules.

The concealment of the assets related to several items of property which were covered by different specifications. The property concealed consisted of the following.

(1) Miller land.
(2) Gas engine.
(3) Mowing machine.
(4) Eight head of cattle.
(5) Twelve hundred posts.
(6) Account against Mrs. Bastian.

The specification as to the oath or false swearing consisted in taking oath that all property owned by bankrupts was set forth in schedules without including that mentioned above.

The specifications were in due course referred by the Court to a Special Master for hearing and report. Testimony was taken by the Special Master and after consideration he made Findings of Fact supporting the specifications as to the concealment of all the property except the account against Mrs. Bastian which he overruled and sustained the specification in connection with the false swearing and made elaborate Findings of Fact and recommended to the Court that the discharge be denied. The testimony was all taken before the Special Master except the depositions in connection

with deposits made by the bankrupts since bankruptcy and the sale of the gas engine, none of which facts are disputed by the bankrupts. He had an opportunity to see the witnesses upon the stand, observe their demeanor and determine the credibility that should be given to their testimony.

Appellees filed objections to the Findings made by the Special Master sustaining the specifications referred to which objections were heard by the Court and after a hearing the Court overruled the objections to the discharge and granted each of the appellees a discharge from his debts.

The Court made no new Findings of Fact but simply entered an order overruling the objections.

Appellant filed a petition for a rehearing which was denied and then appealed to this Court.

ASSIGNMENTS OF ERROR

Appellant relies upon the errors of the Court alleged in the Assignment of Errors found on pages 55 to 58 inclusive of the Transcript, which for the sake of convenience we in effect set forth again.

I.

That the Court erred in granting to the bankrupts a discharge for the reason that the Bankrupts willfully concealed property consisting of a gas engine, mowing machine, eight head of cattle, twelve hundred posts and their ownership of the Miller land consisting of one hundred and sixty acres.

II.

That the Court erred in granting the bankrupts a discharge for the reason that the bankrupts willfully and knowingly failed and neglected to include in the schedules filed the property mentioned in the preceding paragraph.

III.

That the Court erred in granting a discharge to the bankrupts for the reason that the bankrupts committed perjury in connection with the oath taken as to property owned by bankrupts.

IV.

That the Court erred in granting a discharge to the bankrupts for the reason that they willfully failed to produce their books of account showing transactions between themselves and one John Demas.

V.

That the Court erred in granting a discharge to the bankrupts because of the fact that Miltiades Spiroplos less than four months prior to the time of the filing of the petition, transferred an automobile owned by him to one John Demas in payment of a pre-existing debt and the said automobile was not included in the assets listed in the schedules.

VI.

That the Court erred in granting a discharge for the reason that the bankrupts and one John

Demas conspired together for the purpose of concealing assets.

POINTS AND AUTHORITIES IN CONNECTION WITH ASSIGNMENTS OF ERROR.

I.

Findings of Fact made by the Master in Chancery have all the presumptions in their favor and should not be set aside unless error clearly appears. The only question is, are the Findings supported and they should not be overruled unless manifestly wrong.

Simpkon's Federal Equity Suit, 3rd Ed. 574.

Montgomery's Manual of Federal Procedure, 2nd Ed. 447.

Brandenburg on Bankruptcy 4th Ed. 1069.

3 Remington on Bankruptcy, 2nd Ed. 2424.

In Re Conroy, 134 Fed. 764.

II.

The Findings of the Court upon a question of fact are presumptively correct and should be sustained unless some specific error of law or serious mistake of fact intervene in the conclusion of the

case. The fact that the Referee who saw and heard the witnesses and who enjoyed the best opportunity to judge of their credibility comes to a different conclusion, detracts much from the strength of this presumption.

Coder -vs- McPherson, 752 Fed. 951.

III.

In cases where there is a difference between Findings made by a Master or Referee and those made by the District Judge and where the determination depends upon the credibility of the witnesses it is the duty of the Court to accept the Findings of that branch before whom the witnesses personally appeared and who on that account had superior opportunity to determine their credibility.

In Re Wheeler 165 Fed. 188.

IV.

Where the Master is of the opinion that no reliance whatever can be given to the testimony of the bankrupts or his witnesses and there is credible evidence to sustain the specifications, the Findings of the Special Master should not be disturbed.

In Re Knaszak 151 Fed. 503.

In Re Wheeler, 165 Fed. 188.

In Re Harr, 143 Fed. 421.

V.

Concealment may be perpetrated amongst other ways by purposely omitting assets from the schedules in bankruptcy.

3 Remington on Bankruptcy 2nd Ed. 2340.

In Re Skinner 97 Fed. 190.

VI.

Concealment may be perpetrated by purposely failing to schedule property held on secret or resulting trust for the debtors benefit where the legal title to it has never been in the bankrupt.

3 Remington on Bankruptcy 2nd Ed. 2344.

Hudson -vs- Mercantile National Bank 119 Fed. 346.

ARGUMENT

The assignments will be discussed by us in our brief as one proposition, all having to do with the concealment of assets even the one relating to the perjury committed. In fact the gist of the whole matter concerns the charge of concealment of assets and the assignments while directed to different aspects of that general charge yet as a matter of fact are so closely inter-related that a discussion of this general proposition affects the substance of the whole matter of objections to discharge. The entire matter can be presented more clearly and succinctly by discussing all of the assignments as one general proposition of the concealment of assets.

hence our brief will be a discussion of the general proposition of the concealment of assets by the bankrupts.

At the outset it is well to remember that this case rests as a matter of fact upon the Findings made by the Special Master who in this case happens also to be the Referee in Bankruptcy. The Court when objections were made to the Findings contented itself with a review of the conclusions arrived at by the Special Master but as a matter of fact did not disturb the Findings made by the Special Master so that the Findings of the Special Master if supported by any testimony are conclusive in this Court and the only question for discussion is whether or not those Findings are supported by any testimony and justify withholding a discharge.

The fact that the Court made no new Findings of Fact is in effect an approval of the Findings of Fact made by the Special Master. Under these circumstances the only question before this Court is whether or not the Findings are supported by any testimony. The weight of the testimony is not for consideration at all.

In Simpkon's Federal Equity Suit, 3rd Ed. 574, the rule is stated as follows:

> "The rule is that the Findings of Fact by the Master have all the presumptions in their favor and should

not be set aside unless error clearly appears.

* * * *

"The only question is, are the Findings supported * * * and should not be overruled unless manifestly wrong."

In Montgomery's Manual of Federal Procedure, 2nd, Ed. 447, the rule is stated as follows:

"The Conclusions of a Master on matters of fact have every presumption in their favor and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part."

In Brandenburg on Bankruptcy 4th Ed. 1069, testimony. he weight of the testimony is not for

"The Referee's or Special Master's determination upon the sufficiency of the evidence to support specifications of objections is entitled to weight and will not be set aside unless it be clearly erroneous."'

In 3 Remington on Bankruptcy, 2nd Ed. 2424, the rule is stated as follows:

"The Findings of Fact by the Special Master will not be reversed except upon clear and convincing

proof of error. He has view of the witnesses and may note their demeanor on the stand.'"

In Re Conroy 134 Fed. 764, the Court made this statement.

"He, (Special Master) had the witnesses before him and is therefore better able to judge what weight should be given to their utterances than the Court, who must depend upon the written statement."

While the general rule is that the judgment of the lower Court in cases of this kind will not be disturbed unless clearly against the weight of the evidence or unless plain and manifest error exists, this rule is not followed where findings of the Special Master and the District Judge differ. In this case however, the District Judge has in effect approved the Findings made by the Special Master, and the same are therefore less open to question than if there were different Findings made by each Judicial officer. If the position be taken that the Courts order granting the discharge was in effect overruling the Findings made by the Special Master the District Judges' conclusion would be of little binding force upon this Court. This Court would take the same attitude as though it were passing in the first instance upon the report of the Special Master entirely uninfluenced by the order made by the District Judge.

In Coder -vs- McPherson 752 Fed. 951, the Court speaks as follows:

> "The Finding of the Court upon this question of fact is presumptively correct and it should be sustained unless some obvious error of law or serious mistake of fact intervene in the conclusion of the case. The fact that the referee who saw and heard the witnesses and who enjoyed the best opportunity to Judge of the credibility of their testimony came to a different conclusion detracts much however, from the strength of this presumption."

In cases such as the one at bar where the question of concealment depends upon the credibility of the witnesses then the rule is much stronger, disfavoring the disturbing of the Findings made by the Referee or Special Master.

The Court in the case of In Re Wheeler, 165 Fed. 188, says:

> "In cases of this kind where there is nothing in the evidence pointing one way or the other we think it our duty to accept the findings of the branch of the Court before whom the witness personally appeared and who on that account had superior opportunity to

> determine her credibility. In this case that branch of the Court is the referee who under the bankruptcy act * * is given power in the first instance to find the facts and all things considered we think it was error in the District Court not to accept that Finding."

In this case the Referee after hearing the testimony made certain Findings of Fact which we desire to call attention to at this time. They are found on pages 34 to 42 inclusive of the Transcript.

Finding No. 1 overrules the specifications 1 and 2.

Finding No. 2, refers to the eight head of cattle. In that Finding the Court in referring to the credibility of George Spiroplos, one of the appellees says: (pg. 36)

> "And the testimony of George Spiroplos * * is so contradictory that it is entitled to no credit whatever; and the testimony of John Demas * * is so indefinite and uncertain as to be of no value whatever and the Special Master therefore finds that the bankrupts herein have knowingly omitted these cattle from the list of their property and assets as set forth in their schedules and that said cattle were at

the time of the filing of said schedules the property of either the bankrupts as co-partners or of George Spiroplos, individually."

The Special Master's Finding No. 3, has to do with the mowing machine with respect to which the Special Master says: (pg. 36)

> "The testimony of George Spiroplos * * is so contradictory that it is impossible to reconcile the same so as to give it any credit or consideration whatever; and the testimony of John Demas * * is so contradictory that it is impossible to reconcile the same as to give it any credit or consideration whatever, while the testimony of Mr. Frosea * * and that of Mr. Dugger * * and that of Mr. Smith * * clearly indicates that this mower was purchased by George Spiroplos, on behalf of the partnership now in bankruptcy * * and the Special Master therefore finds that this McCormick mower was owned by the partnership now in bankruptcy at the time of the making and filing of the schedules herein and was knowingly omitted from said schedules by the bankrupts."

Finding No. 4, of the Special Master refers to the gasoline engine and in respect thereto the Special Master says: (pg. 38)

> "The testimony of George Spiroplos * * cannot be reconciled sufficiently to deserve any credit or consideration and that the same is true of the testimony of John Demas * * while the testimony of Mrs. McBirney * * and of Mr. Daniels * * , Trustees Exhibits 2, 3, 4, and 5, show conclusively that this engine was purchased by George Spiroplos for the partnership now in bankruptcy prior to the adjudication of bankruptcy * * and the Special Master therefore finds that this gasoline engine was the property of the partnership now in bankruptcy at the time the schedules herein were made and filed and that the same was knowingly omitted from said schedules by these bankrupts."

Finding No. 5, refers to the Miller land and the Special Master in referring to that matter says: (pg. 39)

> "The testimony of George Spiroplos * * and the testimony of Mr. Soule * * and also the testimony of Mr. Smith * * and also the testimony of William Pollman and also Trustee's

> Exhibit 8, 9, 11, 12, 13, 13a, 14, 15, 16, 17, 18, all indicate to the entire satisfaction of the Special Master that this land was purchased by George Spiroplos, one of the bankrupts herein either for himself or for the partnership in bankruptcy herein long prior to the adjudication of bankruptcy herein * * and that the same was paid for by the partnership in bankruptcy herein * * and that said lands are still owned by the partnership in bankruptcy herein or by George Spiroplos one of the bankrupts herein * * and the Special Master therefore finds that said lands were owned by the partnership in bankruptcy herein or by George Spiroplos one of the bankrupts herein but that the same was knowingly omitted by the bankrupts herein in their said schedules."

Schedule No. 6, (pg. 40) refers to the failure of the bankrupts to produce a book of accounts in which Mr. Soule, who had been employed as an accountant by the bankrupts had stated the account between the bankrupts and John Demas had been kept.

Finding No. 7, (pg. 41) refers to the transfer to John Demas of an automobile belonging to one of the bankrupts and giving him a preference and not including the automobile in the assets.

Finding No. 8, (pg. 41) is to the effect that the bankrupts knowingly failed to include 1200 posts in their schedules.

In Finding No. 10, (pg. 42) the Special Master makes this statement.

> "That the bankrupt herein and the said John Demas hereinbefore mentioned have so conducted and arranged matters in their dealings and business connections with each other as to make it impossible to ascertain many facts relative to the matters now under consideration and have undertaken to state the facts relative to several of their business transactions but that in their statements from time to time as shown by the record herein all of which have been made under oath they have contradicted themselves so frequently and in such a manner as to convince the Special Master that they have contrived and conspired together for the purpose of concealing properties belonging to the bankrupts and attempting to make it appear that said properties belonged to said John Demas."

The Special Master then finds as his conclusion (pg. 42) that the bankrupts knowingly and willfully concealed and withheld the property referred to.

It is apparent from the Findings referred to that the Special Master was entirely convinced by the testimony produced that the eight head of cattle, the mowing machine, the gas engine, the posts and the Miller land were at the time of the filing of the schedules the property of the bankrupts. None of this property was scheduled by the bankrupts and none of it was included in their assets. The record amply supports the conclusions reached by the Referee.

We shall not discuss the record in connection with all of the matters upon which Findings have been made. If there was a willful concealment of assets by the bankrupts of any item of property upon which a finding has been made by the Special Master and that finding is supported by the testimony produced it is just as effective to bar a discharge as the concealment of a large number of items of property and while the testimony amply supports all of the Findings made by the Referee we shall discuss at length two of the items of property, the gas engine and the Miller land.

GAS ENGINE

The Court will remember that the Special Master made a finding that at the time of the filing of the schedules the bankrupt partnership owned the gas engine referred to and that it was not included in the schedules. That it was not included is not disputed. Now let us examine the testimony and see what the record shows relative to this gas engine.

On page 92 of the transcript is found the testimony of Mr. V. E. Daniels. Mr. Daniels testified that in April 1919 he was a salesman for the Eastern Oregon Hardware Company which had formerly been known as the Kleinschmidt Hardware Company. That he talked to George Spiroplos prior to the 7th day of April of that year relative to the sale of a gas engine. That the matter was not discussed by him with anyone else. That he went to the ranch of Spiroplos Brothers in connection with the same matter and that an Alamo engine was later sold to George Spiroplos, for the partnership, the engine being shipped from Caldwell, Idaho The first engine was not found satisfactory and was exchanged for a larger one. The Eastern Oregon Hardware Company subsequently dissolved and he tried to find the original sales slip but could not locate it.

Mrs. McBirney a witness whose testimony is found on page 87 of the transcript testified that in 1919 she was bookkeeper for the Eastern Oregon Hardware Company and explained the method of bookkeeping of that Company. There was then presented to Mrs. McBirney a carbon copy of the monthly record of sales to Spiroplos Brothers covering the month of April 1919, the original of which she testified was mailed to Spiroplos Brothers on May 1st. of that year. This was introduced in evidence as Trustee's Exhibit 2 and is found on page 88 of the Transcript of Record. Under date of April 7, is found a debit charge of

$270.20 for one 6 horse power Alamo engine, and under date of April 21, is found a charge of $453.00 for a 9 horse power Alamo engine. In addition there were freight charges in connection with both items. The total amount of sales for the month of April to Spiroplos Brothers is shown by this Exhibit to have been $1166.39. The customers ledger of the Kleinschmidt Hardware Company, subsequently the Eastern Oregon Hardware Company was then produced and pages 31 and 32 under the letters "Si" were identified by the witness as being the account of Spiroplos Brothers, the bankrupts. These two pages were introduced in evidence and were marked as Trustee's Exhibit 3, and are copied into the Transcript on page 91. These pages show the transfer on the 30th day of April to that book of the item of $1166.39 and showing a credit under date of April 21st. from the journal of $278.45 which was identified as the credit given for the return of the smaller engine. Mrs. McBirney testifies that the item of $272.20 was a gas engine sold to the bankrupts, and the item of $453.00 was also a gas engine sold to the bankrupts. This account also shows a credit under date of July 8, of $1058.23. This represented the payment of cash in that sum on that date. Witness identified at that time a check given by George Spiroplos in that sum of money on that date as the check which paid that account in full. This check was introduced as Trustees Exhibit 4, and is copied into the Transcript at page 92.

This testimony by absolutely disinterested witnesses shows the sale of a gas engine by the Kleinschmidt Hardware Company to Spiroplos Brothers and the payment for the same by George Spiroplos one of the bankrupts. The sale of the gas engine to Spiroplos Brothers is conclusively established by this testimony. Bankrupts admit the sale of this engine subsequent to the bankruptcy but deny their ownership claiming it never was the property of the bankrupts. (See testimony George Spiroplos pages 106-109-144-146. Transcript of Record.)

The sale of the engine and the ownership being established as above indicated any explanation or contradiction of the facts and circumstances as outlined would necessarily have to come from the bankrupts themselves. This would necessarily involve the credibility of the witnesses, a matter upon which the Special Master is most fitted to pass. For the purpose of showing that the Special Master was entirely correct in his Finding that the gas engine belonged to the bankrupts and that George Spiroplos and John Demas the witnesses testifying in connection with the purchase of this engine we desire to particularly call the Courts attention to the testimony given by these witnesses respecting that transaction.

George Spiroplos first appeared as a witness on the 26th of May 1921. Relative to the gas engine he testified in the following manner. (pg. 106 Transcript)

That John Demas got the engine from Kleinschmidt, he and Chris Coleman buying it. That George Spiroplos furnished the plant and everything and Coleman and Demas furnished the engine and they all sheared together. **That he did not know when the engine was purchased from Kleinschmidt,** sometime like two or three years. That the engine was taken down to the Flick place when it was first purchased **and that was the first time he knew anything about it.** That he did not remember the year. That the engine had since been sold to Stanfield by John Demas not very long before the testimony was taken, perhaps a month. **That he did not know how much Demas got for it but that he thought a couple hundred dollars.**

Spirpolos was next called as a witness on June 7, 1921. At this time he testified relative to the gas engine as follows: (pg. 109, Transcript)

That the gasoline engine was bought after Spiroplos Brothers had bought the place from John Flick. That they had an old engine from the Flick place but that it was too big for the shearing plant and that Spiroplos Brothers furnished the shearing plant, Chris Coleman and John Demas bought the gasoline engine and they didn't charge each other anything for the use of the plant. **That he (witness) sold the engine to Gerald Stanfield for $200.00.** That he paid the $200.00 to John Demas.

Spiroplos was next called as a witness on October 24th, 1921 at which time he testified relative to the gas engine as follows: (pg. 144 Transcript)

That they then made an agreement with John Demas that they would furnish the shearing plant and he would furnish a gasoline engine and they would shear their sheep together. That Demas furnished an engine. That he thought Mr. Demas ordered the engine in Baker but that he thought it was shipped from the outside. He didn't know where from but that it was ordered through Baker. That the engine was shipped to Spiroplos and charged to Spiroplos Brothers. That Demas ordered the engine himself and that he George Spiroplos did not order it. That George Spiroplos paid for it. That Spiroplos Brothers bought the smaller engine but that the larger engine was bought by John Demas, the smaller engine being returned by Spiroplos Brothers back to Nampa, but that the last engine was ordered by John Demas through Baker but he didn't know where shipped from. That the engine was sold to Gerald Stanfield for $200.00 and that George Spiroplos got the money for the sale. He deposited the money in the Bank to his own credit. On cross examination page 146, he denied that he bought the gas engine himself and that Virgil Daniels the salesman for the Kleinschmidt Hardware Company sold the engine to him. He admitted that Daniels had been down to his place and interviewed him trying to sell him the engine. That he came to Baker himself and closed the transaction sometime in April, 1919, and the engine when shipped was charged to the account of Spiroplos Brothers. That he did not tell the Kleinschmidt

Hardware Company to charge the engine to his account because he wasn't there and he didn't buy it. That he paid for it but he didn't buy it. That Virgil Daniels lied when he said that the witness came in and bought the engine and that witness was the only man that was ever talked to about the sale. Witness then testifies that **Spiroplos Brothers ordered the first engine and they did buy the first engine in the first place which was the engine turned back to the Kleinschmidt Hardware Company and that John Demas ordered the second engine which was shipped to Spiroplos Brothers and charged to Spiroplos Brothers and paid for by Spiroplos Brothers.** That he was unable to produce anything to show that John Demas had ever made a settlement with Spiroplos Brothers in which this engine was paid for by him and that he had known about the hearing for a month. That he doesn't remember any of the items in the settlement that was made at anytime or any amounts that were paid. He identifies the checks which had already been given him by Stanfield in payment for the engine. These checks are set out in full in page 148 of the Transcript.

He claims to have paid Demas the $200.00 for the engine sometime in June, he didn't know at what place, at some sheep camp right after shearing and paid him in cash. That he took no receipt even though he knew that the gas engine transaction was being investigated at the time. That he had testified before the referee on the 26th of May

at which time the gas engine was a matter of inquiry but that he took no receipt from Demas for the payment of the $200.00.

Now if anyone can determine from the testimony of this witness exactly what took place he must be possessed with the power of divination. At the outset Spiroplos says that he didn't know where the engine came from. That it was purchased by Demas and Coleman and paid for by them and that his firm had absolutely nothing to do with it. When the testimony of Daniels supported by the records of the Eastern Oregon Hardware Company are introduced and show beyond cavil or dispute that the engine was purchased by Spiroplos Brothers we then have Spiroplos changing his testimony saying that he ordered the engine, made the deal himself and paid for it but that at some uncertain moment during the business career of himself and John Demas that John Demas reimbursed him for the money. Not a transaction or a scratch of a pen in support of any such claim. We have in addition to that the testimony of Spiroplos at the beginning of the hearing that Demas sold the engine to Stanfield for an amount of money unknown to the witness. We then have his testimony that he sold the engine himself, received the money for it, deposited it to his own credit and then at a sheep camp without recollection as to the location or as to time that the money was turned over to Demas in cash. And this it must be remembered was done at a time when this very transaction was being scrutinized by the

Trustee and by the parties interested in this case. If the question of the weight of the testimony was properly before this Court what we have pointed out would show beyond any question that the Special Master was correct in the Findings which he made.

Let us examine the testimony of Demas, a witness for the bankrupts in connection with this same matter. Mr. Demas testifies in connection with this matter in the following manner, (pg. 124), testimony taken June 7, 1921.

That he had been connected with Spiroplos Brothers for the years 1916 to 1918 at which time he paid all his debts and after that time he took care of himself and that after 1918 he financed his own operations. That he and Chris Coleman bought the gasoline engine, George Spiroplos owning the shearing plant. That George promised to furnish the shearing plant and he and Chris Coleman furnish the gas engine and that he bought the gas engine in 1919 from Kleinschmidt Hardware Company paying $300.00, **using his own money to pay for it.** That he told George Spiroplos to sell the gas engine for him about the 1st of May, 1921. (pg. 125). That he bought the gas engine in 1919 sometime in the early part of April. **That he paid cash for his share and Chris Coleman paid for his share by check.** That he and Chris Coleman bought it together and he paid cash and Chris Coleman paid check and that afterwards Chris Coleman turned

his interest over to him (Demas) and had no more interest in it.

On October 24th, 1921, Demas was again called as a witness for the bankrupts and testified as follows: (pg. 152).

That Spiroplos Brothers had the shearing plant and that he had sheep and he was shearing down on their place and they made an agreement that Spiroplos Brothers should furnish the shearing plant and he would furnish the engine **and he then had Spiroplos Brothers to order the engine and they ordered it and it came. That they bought it and paid for it in the first place and he then settled with them. That he did not order it himself but that Spiroplos ordered it and that he didn know where they ordered it from or from where it came but that Spiroplos Brothers ordered it and he paid for it.** That he had a settlement in 1918 and after that he didn't owe Spiroplos anything. (pg. 153). **That he had nothing whatever to do with the negotiations for the purchase of the gas engine except that he told Spiroplos Brothers to buy the gas engine for him.** That he didn't see any member of the sales force of the Kleinschmidt Hardware Company and **that he did not himself buy the engine but that the entire transaction was handled by Spiroplos Brothers.**

This witness when questioned first about the transaction testifies that he and Chris Coleman bought the engine for cash and paid for it which agreed with the early testimony of Spiroplos. When

Daniels testimony is taken and the records of the Hardware Company are introduced this witness says that he had absolutely nothing to do with the purchase of the engine but that it was bought by Spiroplos at his request and that Spiroplos paid for it and he afterwards reimbursed Spiroplos for what had been paid.

Now these witnesses, Spiroplos and Demas, could not have been telling the truth in all of the tesimony which was submitted by them relative to this gas engine transaction. A portion of this testimony is absolutely incorrect and nothing more is needed than the testimony of themselves to show that fact. That it is willfully false is indicated by the fact that prior to the introduction of the records of the Hardware Company from whom the engine was purchased and the testimony of Daniels, both testified the engine was purchased by Demas and paid for by him. That would clearly establish that Spiroplos Brothers at the time of the bankruptcy had no interest in the property. It became necessary to change the testimony on account of the records of that Company, backed by the check given by Spiroplos in payment of the account which included the engine. We have no hesitancy in saying that that the testimony of the purchase of the engine by Demas and Coleman, by both of these witnesses is deliberately false. It cannot be said to be due to any honest mistake.

With this situation the Master was certainly warranted in making the Findings which he did.

As we stated before the testimony in contradiction of the effect of the testimony given by Daniels and by Mrs. McBirney supported by the records of the Eastern Oregon Hardware Company must of necessity come from the bankrupts themselves and the weight of such contradictory or explanatory testimony depends in this case wholly upon the credibility of the witnesses, contradicting or explaining. The Special Master has specifically found that the bankrupt George Spiroplos has contradicted himself in his testimony in such vital matters and so frequently that his testimony is entitled to no weight whatever and has made the same Findings in respect to the witness Demas. The Special Master saw these witnesses upon the stand, noted their demeanor and the manner in which they testified and after a consideration of the entire record came to the conclusion that neither the bankrupt George Spiroplos nor the witness John Demas were worthy of belief. Unless the Special Master was so clearly erroneous in his conclusion as to the ownership of the gas engine his Findings in respect to that matter cannot at this time be disputed.

In Re Knaszak 151 Fed. 503, the Court in referring to a similar matter said:

> "They (Findings of Fact) are based on conflicting testimony and in their ascertainment much depended upon the credibility of the bankrupt. The Master was of the opinion that no reliance whatever could be given to such

of the bankrupts testimony as was before him. In these circumstances and the record containing other credible evidence to sustain the specifications the Findings of the Special Master should not be disturbed."

Again in the case of In Re Wheeler, 165 Fed. 188:

> "In cases of this kind where there is nothing in the evidence pointing one way or the other we think it our duty to accept the Findings of the branch of the Court before whom the witness personally appeared and who on that account had superior opportunity to determine her credibility. In this case that branch of the Court is the referee who under the bankruptcy act * * is given power in the first instance to find the facts and all things considered we think it was error in the District Court not to accept that finding."

Again in the case of In Re Harr 143 Fed. 421, the Court said:

> "The Findings of Fact by a Special Master who attended the examination of the witnesses thus giving him an opportunity of seeing them testify * * are very persuasive and if there is substantial testimony to sustain the find-

> ing uninfluenced by any mistaken conclusions of law they will not be disturbed by the Court hearing the cause on a transcript of the evidence with out opportunity to see the witnesses and thus to judge of their credibility in the same manner as was enjoyed by the Master. For these reasons the Findings * * will not be disturbed although the testimony is conflicting and but for the findings of the special master the Court might have reached this conclusion."

The force of any dispute therefore of this positive testimony showing the sale in the manner in which it is shown must depend upon the credibility of the witness making the dispute and the Special Master having found that the witness disputing the propositions were not worthy of belief, the finding made by the Special Master must absolutely stand.

THE MILLER LAND

The first testimony in point of time concerning the Miller land transaction is that of William Pollman, (pg. 141) who testified that he was President of the First National Bank of Baker and of the Baker Loan & Trust Company. He had known George Spiroplos since 1912 and also knew Milt Spiroplos but that George Spiroplos had carried on

most of the business for the partnership. That at the time the Miller land was purchased George Spiroplos discussed the matter with him intending to buy the land and take it in the name of John Demas and in that manner enable John Demas to get on the forest reserve. That George Spiroplos told the witness that he was buying the land and was buying it for himself. That Demas did not own it and that the title was taken in the name of Demas simply to enable Demas to get on the reserve and that up to the time of the bankruptcy there had never been a claim made by George Spiroplos or by anyone else that the land belonged to John Demas.

He further testified that Spiroplos Brothers, including George Spiroplos, gave to the First National Bank, a mortgage in 1918 and another in 1919. In the last mortgage the Miller land was included. The next is Trustee's Exhibit No. 14, which is a statement made to the First National Bank on November 27, 1918 for the purpose of obtaining credit. This Exhibit is found on page 62 of the Transcript and contains this item.

"Miller Place near Home, Oregon,
stands in name of John Demas,
..... $2700.00"

This statement is signed by George Spiroplos.

The next matter concerning this land is the inventory in the estate of Nicholas Spiroplos, of which George Spiroplos, one of the bankrupts was administrator. Nick Spiroplos was prior to his

death a member of the partnership of Spiroplos Brothers. This inventory is a part of Trustee's Exhibit 16, contains the following item. (pg. 112)

> "Also an undivided one-fifth interest in what is known as the Miller land now standing in the name of John Demas and described as follows:
> * * * * * * * * * * $200.00"

This inventory is sworn to by George Spiroplos, one of the bankrupts. Subsequently George Spiropolos makes a semi-annual report in which a statement of the property coming into his hands as administrator is made and this statement contains among other assets the Miller land exactly as stated in the inventory. This is a portion of plaintiff's Exhibit 13, found on page 113 of the Transcript and is likewise verified by George Spiroplos. This land next enters into a contract between George Spiroplos as administrator and the widow of Nick Spiroplos, the same being a contract of settlement. This contract appears as Trustee's Exhibit 12, and found on page 119 of the Transcript. This Exhibit contains the names of the partnership existing at the time including all three of the bankrupts and provides that upon the payment of the sum of money fixed thereon the widow shall deed all of her interest in the real estate owned by the partnership.

> "Consisting of what is known as the * * Miller Ranch."

This contract is signed by George Spiroplos

personally and as administrator and on behalf of the other parties.

At this same time a mortgage is given to the First National Bank. This mortgage was introduced in evidence, marked as Exhibit 13a and is found on page 120 of the Transcript. The mortgage describes the Miller land by legal subdivisions except a mistake of one forty and covenants that the three bankrupts are the owners in fee simple of the property described in the mortgage which includes the Miller land and warrants the title against all legal claims.

There was also introduced in evidence as found on page 122 receipts issued by the State Treasurer showing the payment of interest upon a mortgage held by the State upon this land the same showing the payment of interest by George Spiroplos.

On page 114 of the transcript is found excerpts from the final report filed by George Spiroplos as administrator of the Nick Spiroplos estate. This is a portion of Trustee's Exhibit No. 18. In this report the administrator recites the details of the settlement made with the widow of Nick Spiroplos and recites on page 117 that,

> "George Spiroplos, your administrator, in his individual capacity, Milt Spiroplos and Gust Spiroplos purchased all of the right, title, interest and claim of the said Elene Spiroplos Palantas as sole heir at law of Nick Spiroplos, in and to all of the personal

> property * * and as a part of said transaction and settlement the said Elene Spiroplos Palantas made, executed, and delivered her deed of conveyance * * conveying to George Spiroplos, Milt Spiroplos and Gust Spiroplos all of their right, title and interest in and to all of the real property belonging to the firm of Spiroplos Brothers consisting of what is known as the * * * Miller ranch * *."

Attached to that final report is a list of assets belonging to the Spiroplos Brothers co-partnership of which the deceased was a member. This list was prepared by Mr. J. L. Soule for the bankrupts and among other things includes the Miller ranch with a valuation of $1600.00.

The report including the Exhibit is verified by George Spiroplos before his attorney.

This testimony shows conclusively that while title to this land was taken in the name of John Demas it was purchased by Spiroplos Brothers and all times considered as property of the bankrupts. There was no dispute that Spiroplos Brothers bought the land and paid for it, borrowing the money from the First National Bank at the time. It was treated at all times as an asset of Spiroplos Brothers even being included in the mortgage given to the First National Bank by them. It was never considered as an asset by Demas. The

taxes were paid by Spiroplos Brothers and the interest on the mortgage held by the State was likewise taken care of by them. Until the bankruptcy there was never any claim by anyone that this land was not the property of Spiroplos Brothers.

There was an attempted claim made on the part of the bankrupts and by Demas that at the time the land was purchased a charge was made against Demas which was subsequently paid and that the interest and tax charges were likewise subsequently taken care of. It is significant that there is not a scratch of a pen showing the charge of this amount to Demas on any record or book and not a scratch of a pen showing the settlement at any time of any account between Demas and Spiroplos Brothers. This claim rests wholly upon the testimony of George Spiroplos and John Demas entirely unsupported by any fact or circumstance. This testimony cannot overcome the positive record testimony in this case showing this land to be an asset of Spiroplos Brothers and used by Spiroplos Brothers and considered as property owned by them. This testimony is also subject to the same criticism as has been made in connection with the gas engine transaction. The disinterested witnesses in the case and the unquestioned documents show this land to be an asset of Spiroplos Brothers. It was not included in their schedules. It was not included with their assets. The failure to include was absolutely and entirely willful. It was done purposely and with the intention of withholding this

asset whatever its value might be from the Trustee in Bankruptcy.

A good deal the same situation has arisen in connection with the mowing machine as obtains in the gas engine and land transaction. The mowing machine was on the home ranch or Flick place of Spiroplos Brothers and was sold by George Spiroplos to D. L. Forsea, and the money deposited to Spiroplos account in the Bank at Weiser. Spiroplos and Demas then claimed that the mowing machine was the property of Demas and that Spiroplos had turned the money over to Demas which had been received from the sale of the machine. Mr. Dugger, a witness called by the Trustee (pg. 132) testifies that George Spiroplos tried to sell him the mowing machine stating that it belonged to him, had been hid away in the brush but that he would protect Dugger by giving a Bill of Sale dated back a period of one year. This testimony of course is denied by Spiroplos. Dugger also testifies when the offer was made that he came to Baker to find out about it and that upon his return Demas took the matter up with him and found considerable fault because Dugger has referred the matter to the Trustee. The mower being in the possession of the bankrupts would carry a presumption of ownership. This presumption is aided by the fact that George Spiroplos admittedly sold the mowing machine, received the money for it and deposited it to his own credit. It is only contradicted by the testimony of Demas and Spiroplos.

The testimony as to the cattle is not so clear and decisive as that in support of the other matters. The principal thing in connection with the cattle is that Spiroplos did not tell the truth as to what was done with the proceeds from the sale of the cattle. As a matter of fact they were all deposited to the credit of George Spiroplos and his explanation was extremely contradictory and unsatisfactory.

There is not a word of testimony in the entire record disputing the fact that the twelve hundred posts referred to were the posts of the bankrupts prior to the bankruptcy and that they were sold by George Spiroplos to Swisher and were not included in the assets.

As we stated we have discussed in detail only the testimony in connection with the gas engine and the land as in those two respects the testimony is so overwhelming in support of the Findings made by the Master that for those reasons alone the bankrupts are not entitled to a discharge.

We have little more to add to the brief. We believe the testimony overwhelmingly supports the Findings made by the Special Master and that the District Judge was clearly in error in granting a discharge. The record abundantly shows that the bankrupts are not worthy of belief and that their conduct before the Referee and in this proceeding shows conclusively that they deliberately intended to get the benefit at least of the items of property included in the Findings. How much more property

may have gone in the same direction it is impossible to tell.

Some point has been made and no doubt will be urged again that the bankrupts may have been uncertain as to their ownership of the items involved. Even if that be true it was still their duty to include this property in the schedules.

Brandenburg on Bankruptcy 4th Ed. 1096, lays down the rule as follows:

> "If it is doubtful whether a specific item should go to the estate it is not for the bankrupt to constitute himself the Judge, concealing the fact, but it it his duty to disclose the transaction that the Court may determine the right."

It may be urged that compared to the total assets and liabilities of the bankrupts the amount of property concealed is too small to justify an inference of fraudulent intent. That may be true in a case where the record was extremely doubtful as to the intent with which the property was concealed or failed to be included in the schedules. In this case however, where the intent is so overwhelmingly shown the value of the property concealed is of small consequence.

In 3 Remington on Bankruptcy 3rd Ed. 2351, the author lays down this rule,

> "But if the fraudulent intent to conceal is proved the discharge should be

refused even though the value of the assets may be small."

This however, again goes back rather to the weight of the evidence than any matter which could be taken up and determined by this Court.

We are of the firm opinion that the Court was in error in granting the discharge and we respectfully submit that the order should be reversed.

Respectfully submitted,

A. A. SMITH,
Attorney for Appellant.